No. 10-549

IN THE

Supreme Court of the United States

JEFFREY HOLIBAUGH,
Petitioner,

v.

ROBB EVANS & ASSOCIATES LLC,
AS RECEIVER OVER THE ASSETS OF
ANDRIS PUKKE AND DEBTWORKS, INC.,
Respondent.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Fourth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the federal district court supervising a receivership in an action under the Federal Trade Commission Act have ancillary subject matter jurisdiction over a lawsuit filed by the Court-appointed Receiver to recover property of the receivership estate?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, respondent Robb Evans & Associates LLC as Receiver ("Receiver") over the assets of Andris Pukke and DebtWorks, Inc. hereby discloses that (a) there is no parent corporation of respondent Robb Evans & Associates LLC ("REA") in its capacity as a limited liability company or as Receiver, and (b) there is no publicly held corporation that holds 10% or more of the stock of respondent in either of such capacities.

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ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH MORE THAN 100 YEARS OF U.S. SUPREME COURT PRECEDENT AND NUMEROUS DECISIONS OF THE CIRCUIT COURTS OF APPEAL

Respondent Robb Evans & Associates LLC ("Receiver") was appointed as a federal equity receiver over the assets of Andris Pukke ("Pukke")

and DebtWorks, Inc. ("DebtWorks") in the action pending in the United States District Court for the District of Maryland ("District Court") entitled *Federal Trade Commission v. Ameridebt, Inc., et al.*, Case No. 03-3317 PJM ("FTC Action"). The Federal Trade Commission ("FTC") asserted that the defendants made "misrepresentations and deceptive omissions under the Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 41-58" and that they violated "the disclosure requirements under the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801(a) *et seq.*" *See Federal Trade Commission v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 560 (D. Md. 2005). The FTC sought the appointment of the Receiver as one of several items of relief appropriate under the provisions of 15 U.S.C. § 53(b) of the FTC Action authorizing the issuance of a permanent injunction "in proper cases." The District Court found that the power of the court to grant a permanent injunction included "the power to grant any ancillary relief necessary to accomplish complete justice" (*Federal Trade Commission v. Ameridebt, Inc.*, 373 F. Supp. 2d at 562) and appointed the Receiver as well as ordering an asset freeze and other relief. The District Court unquestionably had subject matter jurisdiction in the FTC Action based on federal question jurisdiction. 28 U.S.C. § 1331.[1]

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[1] Petitioner contends, without citation to the Fourth Circuit's opinion, that the Fourth Circuit's decision "concedes the absence of a statutory basis for the District Court's original jurisdiction." Petition for Writ of Certiorari ("Petn."), p. 10. The Fourth Circuit's decision acknowledges that the District Court had subject matter jurisdiction in the underlying FTC Action based on federal question jurisdiction under 28 U.S.C. § 1331 (*see* App. p. 6a ("REA was appointed by the district court in an action over which the district court had federal subject matter jurisdiction")) and held the District Court had ancillary subject matter

Pursuant to the powers and duties conferred on the Receiver under the Preliminary Injunction Order with Asset Freeze, Appointment of a Receiver, Repatriation of Assets, and Other Equitable Relief dated April 20, 2005 (the "Preliminary Injunction Order") (Petn. Appendix ("App.") pp. 63a - 87a) and the Stipulated Final Judgment and Permanent Injunction as to Defendants DebtWorks, Inc. and Andris Pukke (App. pp. 22a - 62a) (collectively the "Receivership Orders") in the FTC Action, the Receiver filed an action against Petitioner Jeffrey Holibaugh ("Holibaugh") in the District Court to collect amounts due under a promissory note executed by Holibaugh in favor of Infinity Resources Group, Inc., one of the receivership entities by the terms of the Receivership Orders.

Judgment was entered in favor of the Receiver against Petitioner Holibaugh for the outstanding balance due under the promissory note. Petitioner seeks review of the Fourth Circuit decision affirming the District Court's denial of Holibaugh's post-judgment motion to dismiss based on lack of subject matter jurisdiction. *Robb Evans & Associates LLC v. Holibaugh*, 608 F. 3d 359 (4th Cir. 2010) (App., pp. 1a-18a).

A long line of federal decisions holds that the federal district court in which a receivership is pending has ancillary subject matter jurisdiction over related actions filed by a receiver in that court where the district court properly has subject matter jurisdiction over the action in which the receiver was

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jurisdiction in the Receiver's related action which was filed against Holibaugh "in furtherance of its duty to marshal Pukke's assets" (*see* App. p. 6a).

appointed. *White v. Ewing*, 159 U.S. 36 (1895); *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. 573, 577 (1899); *Sec. & Exch. Comm'n v. Investors Sec. Corp.*, 560 F.2d 561, 567 (3rd Cir. 1977); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 822 (6th Cir. 1981); *Tcherepnin v. Franz*, 485 F.2d 1251, 1255-56 (7th Cir. 1973); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995); *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008); *Crawford v. Silette*, 608 F. 3d 275, 278 (5th Cir. 2010). None of the cases relied on by Petitioner to support review of the Fourth Circuit's decision in this case reach a contrary result or address this issue.

Petitioner cites three decisions of this Court in an attempt to raise a conflict in federal law to support review. However, *Peacock v. Thomas*, 516 U.S. 349 (1996), *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994) and *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), do not involve the district court's exercise of ancillary subject matter jurisdiction over a lawsuit by a federal equity receiver filed in the receivership court. *Peacock v. Thomas*, 516 U.S. 349 (1996) recognized the continuing existence of ancillary subject matter jurisdiction but refused to extend such jurisdiction to a new lawsuit in federal district court by a party holding a federal judgment for violations of ERISA against a third party alleging alter ego liability for the judgment. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994) held that the district court did not have jurisdiction to enforce a settlement which was recited on the record but which was not part of the stipulation and order dismissing the case, and where the court's order dismissing the case did not reserve jurisdiction to enforce the settlement. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545

U.S. 546 (2005) was a diversity case in which the Court held the district court could exercise supplemental jurisdiction over claims by additional plaintiffs as to which the amount in controversy was less than the minimum amount required in diversity cases, so long as at least one plaintiff met the required amount in controversy.[2]

The Fourth Circuit's decision here is consistent with the substantial line of receivership cases cited above which hold or recognize that the receivership court has ancillary jurisdiction over related lawsuits by the receiver. In the factually analogous case of *White v. Ewing*, 159 U.S. 36 (1895), this Court held that the district court in which a receiver was appointed over an insolvent corporation had ancillary jurisdiction to hear a subsequent suit filed by the court-appointed receiver in the same court for recovery of the outstanding amounts due the insolvent corporation under approximately 130 promissory notes from third party obligors, which were assets of the receivership estate. The Court explained:

> The receiver does not take his authority as an ordinary indorsee of the paper, and subject to the disability to sue in federal court, which attaches to such indorsee, but he takes title by operation of law, and as an instrument of the court which appointed him. . . . . In this case, however, the court proceeds upon its own authority to collect the assets of an estate with the administration of

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[2] Petitioner implicitly recognizes the authority of the Court's prior decisions and the consistency of the Fourth Circuit decision with this Court's prior precedent when Petitioner suggests the Court should overrule its prior holdings in *White v. Ewing*, *Pope v. Louisville, New Albany & Chicago Ry. Co.*, and *Riehle v. Margolies*, 279 U.S. 218 (1929). Petn., pp. 11-12.

> which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation, over which it has by an original bill obtained jurisdiction.

Id. *See also Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. 573 (1899) in which the Court stated:

> The circuit court undoubtedly had jurisdiction of this suit on the ground of diversity of citizenship, not only because that fact existed in respect of complainant and defendants, but because the suit was ancillary to those in which the receiver was appointed. When an action or suit is commenced by a receiver, appointed by a circuit court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the circuit court as a court of the United States is concerned; and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested . . . . [Citations omitted.]

Id. at 577.

Pope arose in a unique procedural context following enactment of the Act of March 3, 1891, 26 Stat. 826: "If the decree of the circuit court of appeals was made final by the act of March 3, 1891, this appeal must be dismissed; and it was so made final if the jurisdiction of the circuit court depended entirely on diverse citizenship." *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. at 576. The Court concluded the appeal should be dismissed based on the finality of the lower court's ruling because jurisdiction was

based solely on diversity of citizenship. *See* Act of March 3, 1891, 26 Stat. 826, 828, Section 6 ("the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States") (App., pp. 100a - 101a). In reaching that determination, the Court described at length and upheld the doctrine of ancillary subject matter jurisdiction applicable to federal courts in federal receivership proceedings. Petitioner's characterization of the *Pope* decision is therefore inaccurate. *See* Petn., n. 2, p. 17.

Published decisions of the federal Courts of Appeal have consistently applied ancillary subject matter jurisdiction to hold that a federal district court may exercise subject matter jurisdiction over suits filed by a receiver in the court in which the receiver was appointed where the receiver is acting in furtherance of his powers and duties in the receivership case. *See Sec. & Exch. Comm'n v. Investors Sec. Corp.*, 560 F.2d 561, 567 (3rd Cir. 1977) (district court had ancillary jurisdiction over suit by receiver appointed in a civil enforcement action by the Securities and Exchange Commission to recover pledged securities constituting receivership assets); *Crawford v. Silette*, 608 F. 3d 275, 278 (5th Cir. 2010) (in an opinion issued shortly after the Fourth Circuit's decision in this case, the Fifth Circuit held the district court in which a receivership was pending in an action by the Commodities Futures Trading Commission had ancillary jurisdiction over the receiver's suit for imposition of an equitable lien on a condominium owned by a third party); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816 (6th Cir. 1981) (district court in which the receiver was appointed had ancillary jurisdiction over actions

by the receiver in that court for recovery against third parties on a promissory note in favor of the receivership entity and over a turnover action against a bank to recover receivership assets); *Tcherepnin v. Franz*, 485 F.2d 1251, 1255-56 (7th Cir. 1973) (receivership court had ancillary jurisdiction over receiver's suit for constructive trust to recover properties from third parties); *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (district court in which receiver was appointed had ancillary jurisdiction, now subsumed under the "supplemental" jurisdiction statute, 28 U.S.C. § 1367, over lawsuits filed by receiver against third parties to recover fraudulent transfers under Illinois state fraudulent transfer statute); *Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008) (district court in which receiver was appointed in action by the Securities and Exchange Commission properly directed the receiver to file suit in that court against third party investors for recovery of transfers under state fraudulent conveyance statutes, noting that, "[a]lthough the Receiver only filed suit under a California statute, we have subject matter jurisdiction because this proceeding is ancillary to the SEC enforcement action").

United States v. Franklin Nat'l Bank, 512 F.2d 245 (2d Cir. 1975), cited by Petitioner, is consistent with these authorities and in fact articulates the same rule regarding the receivership court's ancillary subject matter jurisdiction over actions brought by the receiver in that court. The Second Circuit held that the District Court for the Eastern District of New York did not have subject matter jurisdiction over a lawsuit filed by a federal receiver appointed in an action in the District Court for the *Southern* District of New York but expressly recognized that the District Court for the *Southern* District of New

York would have had subject matter jurisdiction over the receiver's suit under the ancillary jurisdiction doctrine had the suit been filed in that court. *United States v. Franklin Nat'l Bank*, 512 F.2d at 249. The district court in *Canut v. Lyons*, 450 F. Supp. 26 (C.D. Cal. 1977), also cited by Petitioner, recognized it had ancillary subject matter jurisdiction over subsequent suits by the receiver based on this Court's decision in *Pope* but concluded that ancillary jurisdiction was "discretionary" rather than "original," such that the court was not required to exercise jurisdiction over the receiver's suit. *Canut v. Lyons*, 450 F. Supp. at 30-32.[3]

II. THE LEGISLATIVE HISTORY OF 28 U.S.C. § 1367 DOES NOT SUPPORT AN INTENT TO ELIMINATE ANCILLARY SUBJECT MATTER JURISDICTION IN THESE CIRCUMSTANCES

The enactment of 28 U.S.C. § 1367 addressing "supplemental jurisdiction" of the federal district courts does not alter the rule established in the long line of judicial precedent cited above. If Congress intended to overrule *White v. Ewing*, 159 U.S. 36 (1895), *Pope v. Louisville, New Albany & Chicago Ry. Co.*, 173 U.S. 573, and the lower court decisions following those cases that confirm the ancillary subject matter jurisdiction of the receivership court over subsequent suits filed by receivers in that court, such

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[3] In any event, the portion of the *Pope* opinion quoted in *Canut* is incomplete, and the court in *Canut* misstates this Court's *dicta* regarding the application of ancillary jurisdiction in a federal receivership as well as the narrow holding of *Pope* on account of the finality of the lower court's dismissal order based on its finding of a lack of diversity of citizenship.

an intent would have been expressly stated in the legislative history. Instead, the legislative history cites this Court's decision in *Finley v. United States*, 490 U.S. 545 (1989) as "casting some doubt on the authority of the federal courts to hear some claims within supplemental jurisdiction" and indicates that 28 U.S.C. § 1367 was enacted in part out of concern that the *Finley* decision would be applied to unduly restrict the district courts' exercise of supplemental jurisdiction. *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. (1990) § 114, *reprinted in* 16 *Moore's Federal Practice* 3d § 106 App.01, pp. 106 App.-1- 106 App.-2 (3d ed. rev. 2010) (Matthew Bender & Co.). "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). *See also Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F. 3d 103, 127 (2d Cir. 2001) and *Horton v. Reliance Std. Life Ins. Co.*, 141 F. 3d 1038, 1041 (11th Cir. 1998), both citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) indicating that statutes are enacted with a presumption that long-established and familiar common law principles are to be retained unless there is clear contrary legislative intent. Petitioner has cited no legislative history of 28 U.S.C. § 1367 that would support an intent to eliminate ancillary subject matter jurisdiction in the context of federal receivership proceedings articulated in the cited decisions.

III. PETITIONER MISCHARACTERIZES *DONELL* AND IGNORES OTHER CIRCUIT COURT DECISIONS ISSUED AFTER THE ENACTMENT OF THE SUPPLEMENTAL JURISDICTION STATUTE UPHOLDING ANCILLARY JURISDICTION OVER SUBSEQUENT RECEIVER SUITS

Petitioner inaccurately asserts that there was "an independent, statutory basis for subject matter jurisdiction in 15 U.S.C. §§ 77v(a), 78aa" for the claims brought by the receiver in *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008). *See* Petn., p. 11, n.1. Those statutes applied to the underlying action for violations of the securities laws brought by the Securities and Exchange Commission in which the receiver (Donell) was appointed, just as the District Court in this case had original subject matter jurisdiction over the underlying FTC Action based on violations of the FTC Act and related federal statutes. The *Donell* case was a separate subsequent lawsuit filed by the federal equity receiver against third party "winning" investors based exclusively on state law fraudulent conveyance claims, seeking to recover funds paid to investors in excess of the amounts they invested in the receivership entity. The portion of *Donell* quoted by Petitioner states that the receiver was granted authority by the receivership court "to bring suits *under state law in federal court* under ancillary jurisdiction." *Donell v. Kowell*, 533 F.3d at 769 (emphasis added), cited at Petn. p. 17. *Donell* is *not* distinguishable from this case; it is *directly analogous* and supports the District Court's exercise of ancillary subject matter jurisdiction over the Receiver's claim against Holibaugh.

The Fifth and the Seventh Circuits have also issued published decisions after the 1990 enactment of 28 U.S.C. § 1367 which hold that the federal district court which appointed a receiver in civil enforcement actions by a federal regulatory agency had ancillary subject matter jurisdiction over actions filed by the receiver against third parties in connection with his receivership duties. *Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (ancillary jurisdiction over lawsuits filed by receiver against third party to recover fraudulent transfer under Illinois state fraudulent transfer statute); *Crawford v. Silette*, 608 F. 3d 275, 278 (5th Cir. 2010) (ancillary subject matter jurisdiction over receiver's suit for imposition of an equitable lien).

CONCLUSION

There is no conflict on the issue presented between the Fourth Circuit's decision and this Court's decisions or the decisions of the United States Courts of Appeal. No departure from "accepted and usual course of judicial proceedings" occurred. The petition for writ of *certiorari* should be denied.

Respectfully submitted,

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